JUDGMENT OF THE COURT
19 May 1992 *

In Joined Cases C-104/89 and C-37/90,

J. M. Mulder, Den Horn,

W. H. Brinkhoff, de Knipe,

J. M. M. Muskens, Heusden, and

Tj. Twijnstra, Oudemirdum,

all four represented by H. J. Bronkhorst and E. J. Pijnacker Hordijk, of the Bar at The Hague, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 8 Rue Zithe,

applicants,

v

Council of the European Communities, represented by A. Brautigam, Legal Adviser, and G. Houttuin, administrator in the Council's Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Service of the European Investment Bank, 100 Boulevard Konrad Adenauer,

Commission of the European Communities, represented by Robert Caspar Fischer, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, representing the Commission's Legal Service, Wagner Centre, Kirchberg,

* Languages of the case: Dutch and German.

defendants,

and Otto Heinemann, Neustadt, represented by Bernd Meisterernst, Mechtild Düsing and Dietrich Manstetten, Rechtsanwälte at Münster, with an address for service in Luxembourg at the Chambers of Messrs Lambert, Dupong and Konsbruck, 14a Rue des Bains,

applicants,

v

Council of the European Communities, represented by A. Brautigam, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Service of the European Investment Bank, 100 Boulevard Konrad Adenauer,

Commission of the European Communities, represented by Dierk Booss, Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe, Rechtsanwalt at Hamburg, with an address for service in Luxembourg at the office of Roberto Hayder, representing the Commission's Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríquez Iglesias, M. Diez de Velasco and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: J. A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 28 January 1992,

gives the following

Judgment

1 By applications lodged at the Court Registry on 31 March 1989 and 7 February 1990, respectively, J. M. Mulder, W. H. Brinkhoff, J. M. M. Muskens and Tj. Twijnstra, on the one hand (Case C-104/89), and O. Heinemann, on the other hand (Case C-37/90), brought an action against the European Economic Community under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage suffered as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13) as supplemented by Commission Regulation No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11), and as a result of the application of Council Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 (OJ 1989 L 84, p. 2). They are seeking compensation for that damage in so far as those regulations did not provide for the allocation of a representative reference quantity to producers who, pursuant to an undertaking given under Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1), did not deliver any milk during the reference year adopted by the Member State concerned.

2 In accordance with a non-marketing undertaking given pursuant to Regulation No 1078/77, J. M. Mulder, W. M. Brinkhoff, J. M. M. Muskens and Tj. Twijnstra,

farmers in the Netherlands, and O. Heinemann, a farmer in the Federal Republic of Germany, delivered neither milk nor dairy products from their farms for a five-year period including the 1983 calendar year, which was adopted by the Netherlands and the Federal Republic of Germany as the reference year for the purposes of the system of the additional levy on milk. Applications for the allocation of a reference quantity which they made on the expiry of the non-marketing period were rejected by the Netherlands and the German authorities respectively on the ground that they had not made deliveries of milk during the reference year. It was not until after Regulation No 764/89, cited above, came into force that they were allocated provisional special reference quantities under Article 3a of Regulation No 857/84 as amended by Regulation No 764/89.

3 It should be observed *in limine* that Council Regulation No 857/84, as supplemented by Commission Regulation No 1371/84, originally did not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking given under Regulation No 1078/77, delivered no milk during the reference year adopted by the Member State concerned. However, by judgments of 28 April 1988 in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321, paragraph 28, and in Case 170/86 *von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, paragraph 17, the Court declared those rules invalid on the ground that they were in breach of the principle of the protection of legitimate expectations in so far as they did not provide for the allocation of such a quantity.

4 In those judgments, the Court held that a producer who had voluntarily ceased production for a certain period could not legitimately expect to be able to resume production under the same conditions as those which previously applied and not to be subject to any rules of market or structural policy adopted in the meantime (*Mulder*, paragraph 23; *von Deetzen*, paragraph 12). The Court added, however, that where such a producer had been encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of a premium he might legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affected him precisely because he availed himself of the possibilities offered by the Community provisions (*Mulder*, paragraph 24; *von Deetzen*, paragraph 13).

5 Following those judgments, the Council adopted on 20 March 1989 Regulation No 764/89, which inserted a new Article 3a in Regulation No 857/84. That article provides essentially that milk producers who, pursuant to an undertaking given under Regulation No 1078/77, have not delivered milk during the reference year are to receive, in certain circumstances, a special reference quantity equal to 60% of the quantity of milk delivered or the quantity of milk equivalent sold by the producer during the twelve months preceding the month in which the application for the non-marketing or conversion premium was made.

6 That 60% rule, too, was declared invalid by the Court for being in breach of the principle of the protection of legitimate expectations on the ground that the application to the producers covered by Article 3a of Regulation No 857/84, as amended, of a reduction of 40% which, far from being representative of the rates applicable to the producers covered by Article 2, was more than double the highest total of such rates, must be regarded as a restriction which specifically affected the first-mentioned category of producers by very reason of their undertaking as to non-marketing or conversion (judgments of 11 December 1990 in Case C-189/89 *Spagl* v *Hauptzollamt Rosenheim* [1990] ECR I-4539, paragraphs 24 and 29, and in Case C-217/89 *Pastätter* v *Hauptzollamt Bad Reichenhall* [1990] ECR I-4585, paragraphs 15 and 20).

7 Reference is made to the Report for the Hearing for a fuller account of the relevant legislation and the facts of the cases, the course of the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

8 The Council and the Commission contest the admissibility of the applications on the ground that the national authorities' refusal to allocate reference quantities to the applicants is attributable, not to a Community institution, but to the national authorities themselves in so far as they failed to avail themselves of the possibilities afforded by Articles 3, 4 and 4a of Regulation No 857/84.

9 That argument cannot be accepted. The defendant institutions do not claim that it was for the Member States to allocate reference quantities to the applicants using powers which were not provided or appropriate for dealing with cases of farmers who entered into non-marketing undertakings. Accordingly, the unlawfulness alleged in support of the claim for damages must be regarded as issuing, not from a national body, but from the Community legislature; hence any damage ensuing from the implementation of the Community rules by national bodies is attributable to the Community legislature (see the judgment in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, in particular at paragraphs 28 and 19).

10 The Commission further argues that the application in Case C-104/89 is inadmissible on the ground that the applicants have not sufficiently specified the damage which they claim to have suffered owing to the application of Regulation No 764/89.

11 It is sufficient to observe in that regard that that argument is concerned with the amount of the damage for which compensation is sought. Consequently, it falls within the consideration of the substance, that is to say of the circumstances in which the Community may be held liable.

Substance

(a) *The basis for liability*

12 The second paragraph of Article 215 of the Treaty provides that, in the case of non-contractual liability, the Community, in accordance with the general principles common to the laws of the Member States, is to make good any damage caused by its institutions in the performance of their duties. The scope of that provision has been specified in the sense that the Community does not incur liability on account of a legislative measure involving choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (see, in particular, the judgment in Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, paragraphs 4, 5 and 6). More specifically, in a legislative field such as the one in question, which is characterized by the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community cannot incur liability unless the

institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see in particular the judgment in *HNL* v *Commission and Council*, paragraph 6).

13 The Court has also consistently held that, in order for the Community to incur non-contractual liability, the damage alleged must go beyond the bounds of the normal economic risks inherent in the activities in the sector concerned (see the judgments in Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 11, in Joined Cases 241, 242 and and 245 to 250/78 *DGV* v *Council and Commission* [1979] ECR 3017, paragraph 11, in Joined Cases 261 and 262/78 *Interquell Stärke* v *Council and Commission* [1979] ECR 3045, paragraph 14, and in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères* v *Council* [1979] ECR 3091, paragraph 11).

14 Those conditions are fulfilled in the case of Regulation No 857/84 as supplemented by Regulation No 1371/84.

15 In this regard, it must be recalled in the first place that, as the Court held in the judgments of 28 April 1988 in *Mulder* and *von Deetzen*, cited above, those regulations were adopted in breach of the principle of the protection of legitimate expectations, which is a general and superior principle of Community law for the protection of the individual.

16 Secondly, it must be held that, in so far as it failed completely, without invoking any higher public interest, to take account of the specific situation of a clearly defined group of economic agents, that is to say, producers who, pursuant to an undertaking given under Regulation No 1078/77, delivered no milk during the reference year, the Community legislature manifestly and gravely disregarded the limits of its discretionary power, thereby committing a sufficiently serious breach of a superior rule of law.

17 That breach is all the more obvious because the total and permanent exclusion of the producers concerned from the allocation of a reference quantity, which in fact prevented them from resuming the marketing of milk when their non-marketing or conversion undertaking expired, cannot be regarded as being foreseeable or as falling within the bounds of the normal economic risks inherent in the activities of a milk producer.

18 In contrast, contrary to the applicants' assertions, the Community cannot incur liability on account of the fact that Regulation No 764/89 introduced the 60% rule.

19 Admittedly, that rule also infringes the legitimate expectation of the producers concerned with regard to the limited nature of their non-marketing or conversion undertaking, as the Court held in the judgments in *Spagl* and *Pastätter*, cited above. However, the breach of the principle of the protection of legitimate expectations which was held to exist cannot be described as being sufficiently serious within the meaning of the case-law on the non-contractual liability of the Community.

20 In that regard, it must be borne in mind first that, unlike the 1984 rules, which made it impossible for the producers concerned to market milk, the 60% rule enabled those traders to resume their activities as milk producers. Consequently, in the amending regulation, Regulation No 764/89, the Council did not fail to take the situation of the producers concerned into account.

21 Secondly, it must be observed that, by adopting Regulation No 764/89 following the judgments of 28 April 1988 in *Mulder* and *von Deetzen*, cited above, the Community legislature made an economic policy choice with regard to the manner in which it was necessary to implement the principles set out in those judgments. That was based, on the one hand, on the 'overriding necessity of not jeopardizing the fragile stability that currently obtains in the milk products sector' (fifth recital in the preamble to Regulation No 764/89) and, on the other, on the need to strike a balance between the interests of the producers concerned and the interests of the

other producers subject to the scheme. The Council made that choice in such a way as to maintain the level of other producers' reference quantities unchanged while increasing the Community reserve by 600 000 tonnes, or 60% of aggregate foreseeable applications for the allocation of special reference quantities, which, in its view, was the highest quantity compatible with the aims of the scheme. Accordingly, the Council took account of a higher public interest, without gravely and manifestly disregarding the limits of its discretionary power in this area.

22 In the light of the foregoing, it must therefore be held that the Community is bound to make good the damage suffered by the applicants as a result of the application of Regulation No 857/84, as supplemented by Regulation No 1371/84, cited above, but not the damage resulting from the application of Regulation No 764/89, cited above.

(b) *The damage*

23 With regard to the evaluation of the damage which must be regarded as resulting from the application of the 1984 rules, it must be stated *in limine* that all the applicants in the two cases applied for the allocation of a reference quantity under the additional levy scheme before their non-marketing undertakings expired, and resumed the marketing of milk at the latest immediately after they were granted a special reference quantity under Regulation No 764/89. Accordingly, they manifested, in an appropriate manner, their intention to resume milk production, with the result that the loss of income from milk deliveries cannot be regarded as being the consequence of the applicants' freely deciding to give up milk production.

24 This being so, it is necessary to consider the argument of the Council and the Commission that the national authorities' refusal to allocate reference quantities to the applicants cannot be attributed to the Community institutions since under the rules at issue they could have granted them a reference quantity on several different footings.

25 That argument coincides essentially with that advanced by the defendant institutions against the admissibility of the applications. It must therefore be rejected for the same reasons set out in connection with the examination of admissibility (paragraph 9).

26 As regards the extent of the damage which the Community should make good, in the absence of particular circumstances warranting a different assessment, account should be taken of the loss of earnings consisting in the difference between, on the one hand, the income which the applicants would have obtained in the normal course of events from the milk deliveries which they would have made if, during the period between 1 April 1984 (the date of entry into force of Regulation No 857/84) and 29 March 1989 (the date of entry into force of Regulation No 764/89), they had obtained the reference quantities to which they were entitled and, on the other hand, the income which they actually obtained from milk deliveries made during that period in the absence of any reference quantity, plus any income which they obtained, or could have obtained, during that period from any replacement activities.

27 However, that calculation method calls for a number of explanations.

28 As far as concerns in the first place the reference quantities to which the applicants were entitled during the period in question, account must be taken, where the applicants made no milk deliveries during the reference year, of the quantity of milk which they delivered during a representative period prior to their non-marketing period, such as the quantity used as the basis for calculating the non-marketing premium.

29 The latter quantity should be increased by 1% by analogy with Article 2(1) of Regulation No 857/84 so as to ensure that the applicants do not suffer a specific restriction compared with producers whose reference quantities are fixed in accordance with Article 2 of that regulation. However, the resulting quantity should be subject to a reduction representative of the rates of reduction applicable to the producers covered by Article 2 in order to avoid the applicants' being placed at an undue advantage compared with that category of producers.

30 It should be noted that, in order to establish the representative rate of reduction, the percentage referred to in Article 2(2) of Regulation No 857/84 cannot be taken into account. This is because that percentage is intended to offset, on a flat-rate basis, the advantage represented by the increase in overall productivity between 1981 and 1983 where the Member State in question selected the 1982 or 1983 calendar year as reference year rather than the 1981 calendar year. If that percentage were applied to the applicants it would be tantamount to imposing a specific restriction on them, since the reference quantities which were due to them have to be determined on the basis of milk deliveries made prior to 1982.

31 It should further be noted that, in so far as Community rules, such as Council Regulation (EEC) No 775/87 of 16 March 1987 temporarily withdrawing a proportion of the reference quantities mentioned in Article 5c(1) of Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1987 L 78, p. 5), provide for the grant of compensation intended to offset on a flat-rate basis certain reductions made in reference quantities allocated to producers referred to in Article 2 of Regulation No 857/84 or the temporary withdrawal of a proportion of those quantities, that compensation should be taken into account in establishing the representative rate of reduction.

32 The basis which should be taken for calculating the income which the applicants would have received in the normal course of events if they had made milk deliveries corresponding to the reference quantities to which they were entitled is the profitability of a farm representative of the type of farm run by each of the applicants, it being understood that account can be taken in that regard of the reduced profitability generally shown by such a farm during the period when milk production is started up.

33 As regards income from any replacement activities which is to be deducted from the hypothetical income referred to above, it must be noted that that income must be taken to include not only that which the applicants actually obtained from replacement activities, but also that income which they could have obtained had they reasonably engaged in such activities. This conclusion must be reached in the light of a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the

extent of his loss or risk having to bear the damage himself. Any operating losses incurred by the applicants in carrying out such a replacement activity cannot be attributed to the Community, since the origin of such losses does not lie in the effects of the Community rules.

34 It follows that the amount of compensation payable by the Community should correspond to the damage which it caused. The defendant institutions' contention that the amount of the compensation should be calculated on the basis of the amount of the non-marketing premium paid to each of the applicants must therefore be rejected. It must be noted in this regard that that premium constitutes the *quid pro quo* for the non-marketing undertaking and has no connection with the damage which the applicants suffered owing to the application of the rules on the additional levy, which were adopted at a later date.

(c) *Interest*

35 As the Court has consistently held, the amount of compensation due must be subject to interest as from the date of the judgment establishing the obligation to make good the damage. The rate of interest which it is a proper to apply is 8% per annum, provided that that rate does not exceed the rate claimed in the forms of order sought in the applications.

36 It follows that in Case C-104/89 the rate of 8% per annum claimed should be applied and in Case C-37/90 the rate of 7% per annum, in accordance with the form of order sought in the application.

(d) *Amounts of compensation*

37 Having regard to the information in the case-file, the Court considers that it is not in a position at this stage in the proceedings to rule on the amounts of compensation which the Community should pay the individual applicants.

38 The applicants should therefore be asked, subject to a subsequent decision of the Court, to reach agreement on those amounts in the light of the foregoing considerations and to inform the Court, within a period of twelve months, of the amounts of damages arrived at by agreement, failing which they are to send it a statement of their views with supporting figures within the same period.

Costs

39 The costs must be reserved.

On those grounds,

THE COURT,

hereby:

1. Orders the defendants to make good the damage suffered by the applicants as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 in so far as those regulations did not provide for the allocation of a reference quantity to producers who, pursuant to an undertaking given under Council Regulation (EEC) No 1078/77 of 17 May 1977, did not deliver any milk during the reference year adopted by the Member State concerned;

2. Orders that interest at the annual rate of 8% in Case C-104/89 and at 7% in Case C-37/90 shall be payable on the amounts of compensation as from the date of this judgment;

3. For the rest, dismisses the applications;

4. Orders the parties to inform the Court within twelve months from the date of delivery of this judgment of the amounts of damages payable arrived at by agreement;

5. Orders that, in the absence of agreement, the parties shall transmit to the Court within the same period a statement of their views with supporting figures;

6. Reserves the costs.

Due Joliet Schockweiler Grévisse Kapteyn

Mancini Kakouris Moitinho de Almeida

Rodríguez Iglesias Diez de Velasco Zuleeg

Delivered in open court in Luxembourg on 19 May 1992.

J.-G. Giraud
Registrar

O. Due
President